# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement: | |
| A. The Board's findings of fact and conclusions of law | 2 |
| B. The proceedings in the court below | 5 |
| Argument | 7 |
| Conclusion | 10 |
| Appendix | 11 |


## CITATIONS

*Cases:*


| | |
|---|---|
| *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714 | 7, 8 |
| *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898 | 7 |
| *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, reversed, 340 U. S. 361 | 8 |
| *International Union, UAW-AFL, Local 232* v. *Wisconsin Employment Relations Board*, 336 U. S. 245 | 7, 8 |
| *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748 | 7 |
| *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 | 7, 8 |
| *National Labor Relations Board* v. *International Brotherhood*, 196 F. 2d 1 | 6 |


*Statute:*


| | |
|---|---|
| National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*): | |
| Section 7 | 7, 11 |
| Section 8 (a) (1) | 11 |
| Section 8 (a) (3) | 11 |
| Section 10 (a) | 12 |
| Section 10 (c) | 12 |
| Section 10 (e) | 12 |

# In the Supreme Court of the United States

OCTOBER TERM, 1952

---

No. 585

J. I. CASE COMPANY, BETTENDORF WORKS,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court below (R. 6-14) [1] is reported at 198 F. 2d 919. The findings of fact, conclusions of law, and order of the Board (R. 1, 24-42), are reported at 95 NLRB 47.

### JURISDICTION

The judgment of the court below (R. 14-17) was entered on November 7, 1952. The petition for a writ of certiorari was filed on February 4, 1953.

---

[1] The symbol "R" refers to proceedings before the court below. The symbols "R1," "R2," and "R3," respectively refer to the Record as printed for the court below, and to the separate appendices therein filed.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

## QUESTION PRESENTED

Whether employees forfeit the protection of the National Labor Relations Act when, in protest against the discharge of a fellow employee, they engage in a walk-out preparatory to a strike which does not materialize.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 11-13.

## STATEMENT

### A. The Board's Findings of Fact and Conclusions of Law

Following the usual proceedings under Section 10 of the Act, the Board issued its decision and order, in which it found that petitioner had violated Section 8 (a) (1) and (3) of the Act by discriminatorily discharging three employees, Rennaker, Merck, and Lofflin, and by discriminatorily laying off two others, Massey and Runge. The relevant facts, virtually undisputed, are as follows:

The five employees involved in this case were all active members of Local 1008, UAW-CIO, herein called the Union, and with the exception of Runge, were all officers or stewards in that organization (R1, 35;[2] R3, 8, 6-7). Petitioner's knowledge that

[2] All record page references preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

all five employees were engaging in union activities is shown by the fact that Rennaker and Merck had discussed the Union with their foreman, that all five wore union buttons and openly distributed union literature at the plant, and that all five were seen participating in the walkout hereinafter discussed (R1, 35, 32-33; R3, 6-7, 8, 9, 11, 14-15, 19-20, R2, 14-15).

When employee Rennaker reported for work on the morning of June 5, 1950, he learned of the pending discharge of Alice Aaronson, a union steward (R1, 34; R3, 78, R2, 10-12, 15-16).[3] After discussing this matter with other employees, Rennaker and Merck went to see their superintendent but on the way met Mrs. Aaronson and stopped to read her termination papers (R2, 12, 15-16, 31, R3, 10, 16). At this point Mrs. Aaronson's foreman approached the group and told Mrs. Aaronson to "take those God damn papers and get the hell out of here" (R2, 12, 18, 31). Immediately thereafter, Superintendent Claflin emerged from his office and directed Rennaker and Merck to get back to work; they promptly complied (R1, 35; R2, 12, 18, 31).

A little later that morning Foreman Kedich reported to Superintendent Claflin that a plant walkout was going to occur (R2, 62). During the lunch period, 11:45 to 12:15, a number of the employees held a discussion in the plant cafeteria concerning the Aaronson discharge and decided to

---

[3] Aaronson was reinstated four days later (R1, 34; R3, 9). No claim of unlawful discrimination was made with reference to this matter.

stage a protest walkout (R1, 34; R2, 19-20, 31-32). Accordingly, at about 12:00 or 12:15,[4] a group of employees started a walkout and marched in file down several of the aisles seeking to enlist the other employees in the walkout (R1, 34; R2, 20). The support did not materialize—the marchers who numbered no more than twelve or fifteen at any one time dwindled to five—Rennaker, Merck, Lofflin, Massey and Runge—who then gave up and returned to work around 12:30 (R1, 34; R2, 20-21, 26-28, 29, 32, 38-39, 46-47). While engaged in this effort and before they gave up, these five were observed by several of petitioner's supervisors (*ibid.*).[5]

That same afternoon Superintendent Claflin ordered Foreman Kedich to investigate the incident (R1, 35; R2, 57, R3, 19). Upon receiving the report from Kedich, Claflin discharged Rennaker, Merck and Lofflin for the reason stated on their termination papers, namely, that they had "walked off job without permission of foreman and attempted to incite a plant walk-out" (R1, 34; R2, 57-61, 5-6, 21-23, 33-34, R3, 17-19). Massey and Runge were disciplined with two-day layoffs which were imposed, according to the written report, because they had been "helping and participating in

---

[4] The exact time the walkout began is in dispute (R1,34; R2, 20-46). The Board did not resolve this dispute inasmuch as in its view the legal consequences would be the same whether or not the walkout was on company time (R1, 36).

[5] Massey and Runge voluntarily deducted fifteen minutes from their normal work-time when they filled out their time cards (R1, 36; R2, 44-45).

unlawful walk-out, June 5, 1950—12:15-12:30" (R1, 34-35; R2, 6-7, 42-44, R3, 22-27). In the discharge interviews, Superintendent Claflin stressed the seriousness of the employees' action by telling them that if the walkout had succeeded, they would have caused each of the employees to lose ten dollars a day (R1, 35; R2, 60, R3, 18-19). After telling Merck that he could have been foreman, Claflin stated that the walkout was not the "right way" and that the employees had gone "too far" (R1, 33; R3, 17-19).

Upon the foregoing facts, the Board found that the walkout in protest against the discharge of a fellow employee was a protected concerted activity within the meaning of Section 7 of the Act, and that petitioner by discharging and laying off employees because of their participation in that activity violated Section 8 (a) (1) and (3) of the Act (R1, 36-37, 26). Accordingly, the Board directed petitioner to cease and desist from the unfair labor practices found and from interfering in any other manner with the rights guaranteed the employees under Section 7 of the Act. Affirmatively, the Board ordered petitioner to reinstate and make whole the three employees discharged, to make whole the two employees suspended, and to post the usual notices (R1, 26-28).

### B. The Proceedings in the Court Below

On November 7, 1951, the Board filed in the court below a petition for enforcement of its order (R1, 42-47). On September 16, 1952, the court below

handed down its opinion in which it enforced the Board's order with a single modification which is not in issue here (R. 6-14).[6] The court agreed with the Board that the walkout here involved was a protected concerted activity within the sweep of the Section 7 guarantee, that its purpose—a protest against the discharge of a fellow employee—was a lawful and permissible objective, and that it was "carried on within bounds and under conditions which could not be declared to be legally unreasonable as a matter of particular plant-situation" (R. 8-9). The court distinguished the activity here involved from activities which are violative of an agreement or which represent an attempt by employees to work on their own terms or unilaterally to dictate how the employer's operations should be run (R. 9-10). Accordingly, the court held that petitioner's reprisals against the five employees for having engaged in the walkout constituted a violation of Section 8 (a) (1) of the Act (R. 10). Pursuant to this holding, the court noted that the Board's order directing reinstatement and

---

[6] The court below, while enforcing the remedial provisions of the Board's order *in toto*, struck the cease-and-desist provision which was predicated on a finding that petitioner's conduct was violative of Section 8 (a) (3) of the Act (R. 13-14). Relying, *inter alia*, on its prior decision in *National Labor Relations Board* v. *International Brotherhood*, 196 F. 2d 1, the court below ruled that the conduct in question was not violative of Section 8 (a) (3) because it did not have "the proximate and predictable effect of encouraging or discouraging membership in a labor organization" (R. 11-12). The Board has challenged the correctness of that ruling in the above-cited case, which this Court now has under consideration on writ of certiorari, No. 301, this Term.

back pay was fully justified and within the scope of the remedial powers granted the Board under Section 10 (c) of the Act (R. 13-14).

ARGUMENT

1. Petitioner does not question the validity of the proposition that employees may lawfully engage in a peaceful strike or walkout in protest against the discharge of a fellow employee. And the protection which the Act affords such concerted activity is applicable whether the discharge is lawful or discriminatory. *Cusano* v. *National Labor Relations Board,* 190 F. 2d 898, 902 (C. A. 3), and cases cited; *National Labor Relations Board* v. *Globe Wireless, Ltd.,* 193 F. 2d 748, 750 (C. A. 9); *Carter Carburetor Corp.* v. *National Labor Relations Board,* 140 F. 2d 714, 717-718 (C. A. 8). In the instant case, it is undisputed that the walkout, although abortive, was in protest against the discharge of employee Aaronson, and was designed for the employees' "mutual aid and protection" (Section 7 of the Act).

Bound by these settled principles, petitioner contends merely that the ruling in this case, and the rulings in the cases relied upon by the court below,[7] are in conflict with the decision of this Court in *International Union, UAW-AFL, Local 232* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, and with certain decisions of the courts

[7] *Carter Carburetor Corp.* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Globe Wireless, Ltd., supra; National Labor Relations Board* v. *Kennametal, Inc.,* 182 F. 2d 817 (C.A. 3).

of appeals. Brief analysis reveals the lack of merit to this contention.

2. Petitioner misconceives the scope of this Court's holding in the *U. A. W.* case (336 U.S. 245). As the Third Circuit observed in *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d, at 819, where an identical contention was made in a comparable situation, the *U. A. W.* case holds merely:

> that a union stratagem of calling recurrent or intermittent unannounced stoppages to win unstated ends is not a protected activity and a state may constitutionally legislate against it. Cf. comment in *International Union, etc.* v. *O'Brien*, 70 S. Ct. 781 [339 U. S. 454, 459]. The *U. A. W.* decision does not hold that a single spontaneous work stoppage such as we have here is unlawful.

Here, as in *Kennametal*, we do not have "a new technique for bringing pressure upon the employer," a "recurrent or intermittent unannounced stoppage of work to win unstated ends" (*U.A.W.*, 336 U. S., at 249, 264). Rather, we have nothing more than a peaceful walkout preliminary to a proposed strike in support of a known and permissible objective. The fact that the walkout did not develop into a full-blown strike as planned does not abate the protection which would otherwise have attached. *Kennametal, supra*, at 819; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499 (C. A. 5), reversed on another point, 340 U. S.

361; *Carter Carburetor Corp.*, 140 F. 2d at 717-718 (C. A. 8).

3. Petitioners claim (Pet. 8-9) that the ruling of the court below in the instant case conflicts with numerous decisions of the courts of appeals is without substance. Those cases, as shown by the very statement of them contained in the petition, pp. 8-9, involve situations where the concerted activities took the form of an "inside seizure" and "an exercised control by the employees of the employer's business, such as an attempt to remain on their jobs and perform only such tasks as they choose, or otherwise to presume to conduct the operations of the business on their own terms" (R. 9). The impropriety of such conduct, expressly acknowledged by the court below, has no bearing on the conduct here involved which consisted merely of a walkout, preliminary to a proposed strike, "carried on within bounds and under conditions which could not be declared to be legally unreasonable as a matter of particular plant-situation" (R. 9). To argue, as petitioner does (Pet., 10), that the walkout here should be denied protection because it took place in part or in whole on working time, is as idle as it would be to argue that an otherwise lawful strike should be denied protection because it encompasses working time.

## CONCLUSION

The decision below is correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
*Solicitor General.*

GEORGE J. BOTT,
*General Counsel,*

DAVID P. FINDLING,
*Associate General Counsel,*

DOMINICK L. MANOLI,
*Assistant General Counsel,*

ARNOLD ORDMAN,
*Attorney,*
*National Labor Relations Board.*

FEBRUARY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V, 151, *et seq.)*, are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and

shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 242770 1177